TERAS MAJU UTARA BAHAN BINAAN (M) SDN BHD v. TETUAN RAMLI AMAR JIT & TAN

HIGH COURT MALAYA, ALOR SETAR
CHAN JIT LI JC
[CIVIL APPEAL NO: 12(A)NCVC-02-01-2017]
1 OCTOBER 2017

CIVIL PROCEDURE: *Appeal – Notice of appeal – Notice of appeal served on defendant within time but neither sealed nor endorsed – Second notice of appeal endorsed but remained unsealed and served out of time – Whether there was proper service of notice of appeal – Whether there was defect in appeal record – Whether there was non-compliance of O. 55 of Rules of Court 2012*

The present appeal emanated from the Sessions Court. The respondent ('the defendant') had filed its statement of defence and counterclaimed against the appellant ('the plaintiff'). The defendant then proceeded to file an application under O. 18 of the Rules of Court 2012 ('the ROC') to strike out the plaintiff's claim. The Sessions Court Judge ('the SCJ') allowed the defendant's application and the plaintiff's claim was struck out. The defendant applied for default judgment on the counterclaim as no defence was filed by the plaintiff. The application for the default judgment was heard *inter partes* and the SCJ allowed the application ('the order'). Instead of appealing against the order, the plaintiff filed an application at the same Sessions Court to set aside the order ('encl. 36'). Enclosure 36 was also heard *inter partes* and was dismissed by the SCJ ('the judgment'). Hence, the present appeal. The judgment was delivered on 14 December 2016. The plaintiff had until 28 December 2016 to file and serve the notice of appeal on the defendant. The plaintiff filed its notice of appeal on 26 December 2016 ('the 26 December notice') and served the same on the defendant on 27 December 2016. Although the 26 December notice was served within time, it was neither sealed nor endorsed. On 2 January 2017, the plaintiff served on the defendant another copy of the 26 December notice ('the second service') which was endorsed but remained unsealed. The second service was, however, served out of time. The defendant raised a preliminary objection that there was non-compliance, which was fatal, of the provisions of the ROC as (i) there was no proper service of notice of appeal on the defendant ('the first preliminary objection'); and (ii) the appeal record was defective because the plaintiff failed to comply with O. 55 r. 5(3) of the ROC ('the second preliminary objection'). In refuting the preliminary objection, the plaintiff argued that it was no longer the practice of courts to seal notices of appeal. On the issue of the second service, the plaintiff submitted that the delay was beyond his control as the court had returned the notice of appeal

to him only on 29 December 2016. According to the plaintiff, 2 January 2017 was the earliest possible date that he was able to effect service as 30 and 31 December 2016, being Friday and Saturday, were the weekend holidays in Kedah and the defendant's solicitors was closed on 1 January 2017.

Held (dismissing appeal):

(1) The first preliminary objection was dismissed. There was no necessity for the plaintiff to serve an endorsed and/or sealed copy of the notice of appeal. Thus, the first instance of service of a duplicate copy of the 26 December notice on 27 December 2016, which was within time, sufficed and was good. There was proper service of the notice of appeal on the defendant by the plaintiff. (paras 14 & 15)

(2) As the decisions appealed against in this case was 'a decision other than a decision made in trial', it behoved on the plaintiff to comply with O. 55 r. 5 of the ROC. Order 55 r. 5(3) requires the plaintiff, within one month after the filing of the notice of appeal, to file the record of appeal in the High Court and the record shall contain copies of: (a) the application for the decision; (b) all pleadings filed; (c) all affidavits filed in support of or in opposition to the application; and (d) the order or draft order of the decision appealed from. Order 55 r. 5(3) too uses the word 'shall'. Therefore, the plaintiff was required to enclose the pleadings in the appeal record. However, the plaintiff elected not to do so despite the fact that the defendant had, by a letter dated 17 January 2017, recorded their objections. With the omission of the pleadings, the appeal record was defective and the defect was fatal. The second preliminary objection was upheld. (paras 18, 20 & 21)

Case(s) referred to:

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals [2017] 10 CLJ 296 CA ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18, O. 42 r. 13, O. 55 rr. 3(4), 5(3)

For the appellant - Wong Tai Hau; M/s TH Wong & Co

For the respondent - Quah Chien Chieh & Oon Kian Wooi; M/s Ramli Amar Jit & Tan

Reported by Najib Tamby

JUDGMENT

Chan Jit Li JC:

[1] This appeal emanates from the Sessions Court at Alor Setar.

[2] At the lower court, the appellant was the plaintiff whilst the respondent was the defendant. (For ease of reference, I shall refer to the parties as the plaintiff and the defendant.)

[3] I am unable to ascertain the plaintiff's cause of action at the lower court as the pleadings are not enclosed in the appeal record. But I am given to understand that apart from filing its statement of defence, the defendant had also filed a counterclaim against the plaintiff.

[4] The defendant then proceeded to file an application under O. 18 of the Rules of Court 2012 (ROC) to strike out the plaintiff's claim. After hearing submissions from both parties, the learned Sessions Court Judge allowed the defendant's application. Thus the plaintiff's claim against the defendant was struck out.

[5] The learned Sessions Court Judge then went on to deal with the defendant's counterclaim. The defendant had applied for default judgment on the counterclaim as no defence was filed by the plaintiff. The application for the default judgment was heard *inter parte*. And, after this hearing, the learned Sessions Judge on 21 June 2016 allowed the defendant to sign a judgment in default against the plaintiff.

[6] Instead of appealing against the order of 21 June, the plaintiff filed an application at the same Sessions Court to set aside the said order. This application identified as encl. 36 was also heard *inter parte*. After the hearing, the learned Sessions Judge on 14 December 2016 dismissed encl. 36. The plaintiff then filed the instant appeal.

[7] At the hearing of the appeal before me, Mr Quah Chien Chieh and Mr Oon Kian Wooi, learned counsel for the defendant raised a preliminary objection. The preliminary objections, according to them, related to plaintiff's non-compliance of the provisions of the ROC. They added that the non-compliance was fatal and related to two issues. The first issue was that there was no proper service of the notice of appeal on the defendant. The second issue was that the appeal record was defective.

[8] From the submissions made in respect of the preliminary objections, I discern that the following issues require determination:

(i) Whether or not there was proper service of the notice of appeal? and

(ii) Whether the alleged defect in the appeal record is fatal.

Whether Or Not There Was Proper Service Of The Notice Of Appeal?

[9] The following are undisputed facts. The judgment which is the subject matter of this appeal was delivered on 14 December 2016. Thus, the plaintiff had until 28 December to file and serve the notice of appeal on the defendant. The plaintiff filed its notice of appeal on 26 December 2016. It served a copy of this notice of appeal on the defendant on 27 December 2016. This notice of appeal which was served within time was neither sealed nor endorsed.

[10] Then on 2 January 2017, the plaintiff caused to be served on the defendant another copy of the 26 December 2016 notice of appeal. This copy was endorsed but remained unsealed. This second service was, however, served out of time. Premised on these facts, learned counsel for the defendant submitted that the service of plaintiff's notice of appeal was bad in that what was served within time was not endorsed and sealed and what was sealed was out of time.

[11] In reply, Mr TH Wong, learned counsel for the plaintiff submits that this preliminary objection is without merits. He contends that it is no longer the practice of the courts to seal notices of appeal even though e-filing was not yet implemented at the time this matter arose. Thus, the endorsed but unsealed copy of the notice of appeal which he served at the second instance was the actual notice of appeal issued by the court.

[12] On the issue of the service at the second instance being out of time, Mr Wong submits that the delay was beyond his control. He claims that the court had returned the notice of appeal to him only on 29 December 2016. He was unable to effect service the following two days, 30 and 31 December 2016, as the days being Friday and Saturday were the week end holidays in Kedah. He was also unable to serve the said notice of appeal on 1 January 2017, Sunday, as the solicitors' firm for the defendant closes on Sunday. Thus, Mr Wong contends, 2 January 2017 was the earliest possible date that he was able to effect service.

[13] The governing provision for a notice of appeal is O. 55 r. 3 ROC. As the preliminary objection related to the service of the same, the specific provision is O. 55 r. 3(4) which provides as follows:

> Notice of appeal against a decision made after trial.
>
> 3.(1) …
>
> (2) ….
>
> (3) ….
>
> (4) A duplicate copy of the notice of appeal must be served by the appellant within the time limited for the filing of an appeal on all respondents.
>
> (5) …

The ROC does not define the term 'duplicate copy.' However, the phrase was subjected to judicial interpretation in *Redang Paradise Vacation Sdn Bhd v. Yap Chuan Bin & Other Appeals* [2017] 10 CLJ 296. His Lordship Hamid Sultan JCA delivering the judgment of the Court of Appeal held (at p. 300):

> Brief Facts
>
> [7] In the instant case, there were three actions in the Magistrate's Court. The decisions for all three actions were given on 14 December 2015. The appellants/defendants had filed and served a duplicate copy of the notice

of appeal on 23 December 2015 within the stipulated time of 14 days from the date of decision. The notice of appeal is in form 111 of the RC 2012. There is no requirement under form 111 for any endorsement or seal of the court to be placed on the notice of appeal unlike a writ or originating process, etc. The said form 111 reads as follows:

> No. 111
>
> NOTICE OF APPEAL (AFTER TRIAL) (O. 55, r. 3)
>
> (Heading)
>
> Take Notice that ... (1) being dissatisfied with the decision of the Sessions/Magistrates' Court after trial at ... given on the ... day of ... , 20 ..., appeals to the High Court against either/or the whole of the said decision such part of the said decision as decides that
>
> (set out details)
>
> Dated the ... day of ... 20 ...
>
> ...
>
> Appellant/Solicitor for the Appellant
>
> To
>
> The Registrar, Sessions Court at ...
>
> The Magistrate at ...
>
> and to
>
> ...
>
> ... (2)
>
> NOTES:
>
> (1) Insert name of appellant.
>
> (2) Insert name and address of respondent or respondents.

[8] The RC 2012 only requires a duplicate copy of the notice of appeal to be served within the time frame. The relevant order is O. 55 r. 3(4) reads as follows:

> Notice of appeal against a decision made after trial (O. 55 r. 3)
>
> 3. (1) A notice of appeal against a decision made after trial shall substantially be in Form 111 and shall be filed in the Court from which the decision is appealed from.
>
> (2) Any appellant may appeal from the whole or part of a judgment or order and the notice of appeal shall state whether the whole or part only, and what part, of the judgment or order is complained of.

A (3) At the time of the filing of the appeal under this rule, the appellant shall, unless the Court for sufficient cause otherwise orders, lodge in the Court appealed from a sum of one thousand ringgit by way of security for the costs of the appeal within the time limited for filing of the appeal.

B (4) A duplicate copy of the notice of appeal must be served by the appellant within the time limited for the filing of an appeal on all respondents.

[9] The learned High Court Judge in interpreting RC 2012 took into consideration three reported decisions to rule that it is not sufficient to serve a duplicate copy and held the copy to be served must be endorsed C by the court. The cases relied by learned judge were as follows: (i) *Majlis Perbandaran Kangar v. Senati Development Corp Sdn Bhd* [2006] 4 CLJ 953; [2007] 1 MLJ 133; (ii) *MBf Cars Services Sdn Bhd v. Chew An Too @ Chew Hoc Kee* [2009] 1 MLJ 684; (iii) *Ketua Pengarah Hasil Dalam Negeri v. Continental Automotive Instruments (M) Sdn Bhd* [2014] 1 LNS 1301; [2015] 9 MLJ 857. D

[10] The learned counsel for the appellant on this issue *inter alia* submits as follows:

(i) it was of course not disputed that the Notice of Appeal was filed in the Court Registry on 23.12.2015, which is within the stipulated E 14 days' time frame;

(ii) the duplicate copy of the Notice of Appeal was served on the Respondent/Defendant on 23.12.2015, again it is within the stipulated time frame;

(iii) that the Respondent/Plaintiff was put on notice of the appeal F within 14 days, therefore, they were not prejudiced in any manner; and

(iv) most importantly, the Learned Judge, failed to take into account the changes in the provision as stated in Order 55 Rule 3(4) ROC 2012, whereby the new requirement is that only a G "duplicate" copy of the Notice of Appeal need to be served on the Respondent.

[11] We have read the appeal record for all the three appeals and the able submissions of the parties. We are of the considered view that the appeals should be allowed *in limine*. Our reasons *inter alia* are as follows:

H (i) in the instant case, Notice of Appeal as well as the duplicate copy of the appeal have been served on the respondent within time frame and in compliance to O. 55 r. 3(4) of RC 2012;

(ii) there is no requirement in law or rules to require an endorsed notice of appeal to be served within the time frame of the appeal. Even if I there is such a rule, it will cause travesty of justice as it is common knowledge that court documents and endorsement or seal of the court are not placed immediately upon filing at the court registry or

even through the e-filing system. (See *Jumatsah Daud v. Voon Kin Kuet* [1980] 1 LNS 176; [1981] 1 MLJ 254). The decision of His Lordship Justice V.T. Singam in the case of *Ng Cheah Cheong v. Ong Sing Hock* [2002] 7 CLJ 504; [2002] 6 MLJ 481 is very instructive not only for decisions made in respect of Rules of High Court 1980 but also for RC 2012. Very importantly, the decision also reflects common sense jurisprudence in decision making process. The facts of that case as summarised by the learned editors of MLJ read as follows:

> This is an appeal against the decision of the Sessions Court, Taiping that dismissed the appellant's claim for damages for injuries arising out of a road accident that occurred on 2 November 1993 involving his motorcycle and a motorcycle that was ridden by the respondent. The appeal was against liability and quantum. The appellant in this case was the plaintiff, aged 23 years, a restaurant worker. He had filed an action at the Sessions Court, Taiping for general and special damages against the respondent. At the outset of the appeal that came up for hearing, the respondent raised a point of law as a preliminary objection that the appeal was not properly brought before this court. It was contended that the notice of appeal which was served on the respondent's solicitor was defective as the copy which was served was not endorsed by the court, in this case by the Sessions Court, Taiping, before it was served as required under O. 49 r. (2)(6) of the Subordinate Courts Rules 1980 ('the SCR').

The court in allowing the appeal *inter alia* held that:

(1) The whole purpose of serving a copy of the notice of appeal on the opponent or the respondent or on all parties directly affected by the appeal within the time frame limited to file an appeal under the rules is to give early notice to the parties that the appellant is dissatisfied with the decision of the court and that he wishes to appeal to the High Court. By this early notice, there will be no room for surprises, delays and prejudice caused to any party directly affected by the appeal. The legislature and the Rules Committee have, in their own wisdom, not required an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors and that it only required service of the notice of appeal, and that it be served within the time limited to file the appeal, being within 14 days from the date on which the decision was pronounced by the lower court (see p. 488D-F).

(2) In the face of this express provision in O. 49 r. 2(6) of the SCR which is crystal clear, so plain and unambiguous, there was no requirement for an endorsed copy by the court of the notice of appeal to be served on the respondent's solicitors. If this requirement is insisted it would surely be a usurpation of the legislative function and an extension to the Parliamentary language, and this court would then be encroaching into the domain of the

> legislature and importing words into the rules of the court which have in fact statutory force. This court is reminded that the function of this court is 'interpretation, not legislation'. Consequently, it is not the function of this court to include words to the rules of the court (see pp. 488F-H, 489F); *Himat Iktisas (M) Sdn Bhd v. Better Sleep Marketing (East Coast) Sdn Bhd* [2001] 4 CLJ 528; [2002] 1 MLJ 577.
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> [12] For reasons stated above, all the appeals are allowed with no order as to costs and deposits are to be refunded.

[14] Going by the authority, it is clear that there was no necessity for the plaintiff to serve an endorsed and/or sealed copy of the notice of appeal. Thus, the first instance of service of a duplicate copy of the 26 December notice of appeal on 27 December 2016 which was within time sufficed and was good.

[15] I find from the agreed facts before me that there was proper service of the notice of appeal on the defendant by the plaintiff. The first preliminary objection is dismissed.

Whether The Alleged Defect In The Appeal Record Is Defective?

[16] En Oon submits that the appeal record is defective because the plaintiff has failed to comply with O. 55 r. 5(3) ROC. In reply, En Wong submits that the governing provision for this appeal is O. 42 r. 13 and not O. 55 r. 5. Hence, there was no necessity for the plaintiff to comply with O. 55 r. 5(3).

[17] Order 42 r. 13 reads as follows:

> Setting aside or varying judgment and orders.
>
> 13. save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or vary such order or judgment shall make **an application** to the Court and serve it on the party who has obtained the order or judgment within thirty days after the receipt of the order or judgment by him.
>
> (emphasis added)

[18] The above provision governs an application for a variation of or the setting aside of a judgment and/or an order. It does not provide for appeals from the subordinate courts to the High Court but O. 55 does. The plaintiff's appeal clearly falls within this category. As the decision appealed against in this case is 'a decision other than a decision made after trial,' it behoves on the plaintiff to comply with O. 55 r. 5 and O. 55 r. 5(3) requires him to do the following:

> Notice of appeal against any decision other than a decision made after trial.
>
> 5. (1) …
>
> (2)…

(3) Within one month after the filing of the notice of appeal under this rule, the appellant **shall** file the record of appeal in the High Court, and the record shall contain copies of:

(a) the application for the decision;

(b) all pleadings filed;

(c) all affidavits filed in support of or in opposition to the application, and

(d) the order or draft order of the decision appealed from.

Provided that the record of appeal shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

(emphasis added)

[19] In *Low Cheng Soon v. TA Securities Sdn Bhd* [2003] 1 CLJ 309; [2003] 1 MLJ 389 Alauddin JCA (as he then was) delivering the judgment of the Court of Appeal held (at p. 314 (CLJ); p. 394 (MLJ)):

There is no doubt in our minds and we agree with learned counsel for the respondent that this rule is mandatory. There are abundant authorities decided in our courts to suggest that the word 'shall' when used in any legislation means 'óbligatory'. However, we do not propose to cite these authorities. Suffice it for us to say that the word 'shall' used in r. 18(4)(c) of the Rules reflects a measure of mandatoriness in it. As this is a mandatory rule, it must therefore be strictly adhered to.

[20] Order 55 r. 5(3) too uses the word 'shall'. The plaintiff was therefore required to enclose the pleadings in the appeal record. However, the plaintiff elected not to do so despite the fact that the defendant's solicitors had by a letter dated 17 January 2017 recorded their objections. I find that with the omission of the pleadings, the appeal record is defective and the defect is fatal.

[21] The defendant's preliminary objection in respect of the defective appeal record is upheld. Accordingly, the plaintiff's appeal is dismissed with costs of RM2,000.